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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 288

LYKES BROS. STFAMSHIP CO. INC.,
Petitioner,

vs.

FRANK CANNELLA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

ARTHUR M. BOAL,
Counsel for the Petitioner.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Lykes Bros. Steamship Co. Inc. prays that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on May 31, 1949.

Opinions Below.

The opinions of the Court of Appeals are reported in 174 Fed. (2d) 794. The first opinion is in the Record at 182-A and the supplemental opinion at 204-A. The Opinion of the District Court is not reported (Rec. 147-A).

Jurisdiction.

The judgment of the Court of Appeals was entered on the 31st day of May, 1949 (Rec. 208-A). The jurisdiction of the court is invoked under 28 U. S. C. 1254(1). The time for presenting the petition expires on August 29, 1949.

Questions Presented.

The question presented is:—whether a shipowner whose vessel is requisitioned by the United States under bareboat requisition charter party is liable to a longshoreman for injuries caused by unseaworthiness of the vessel while she is in the possession of the United States under requisition charter party, and the provisions of that charter party negative any warranty of seaworthiness.

Statement.

The *SS. Nemaha* was owned by the Petitioner and was requisitioned by the United States under bareboat requisition charter party. Under this charter party all the incidents of ownership passed to the United States.

The respondent, a longeshoreman, was working on a lighter alongside the *Nemaha*. There was a Jacob's ladder extending from the deck of the ship to the lighter. While ascending the ladder at 7:45 P. M. on February 19, 1945, the respondent fell from the ladder to the lighter and sustained injuries. The longshoreman had been using this ladder since 8 o'clock in the morning of that day. The respondent claims that his fall was caused by a breaking of a rung in the ladder.

The respondent brought suit against Lykes Bros. Steamship Co. Inc. alleging two causes of action—one

based upon unseaworthiness and a second based on negligence under the Jones Act. The first cause of action was dismissed at the end of the plaintiff's case, the second cause of action was permitted to go to the jury which returned a verdict in respondent's favor in the sum of $12,000. This was set aside by the District Judge and the action dismissed.

In its opinion the District Court said:

> "The fact is not here disputed that at the time of plaintiff's injuries, the *SS. Nemaha,* although owned by the defendant, was nevertheless under requisition bareboat charter to the United States. Under that charter, the United States had all of the incidents of ownership of the vessel for the charter period (Rec. 148-A).

The Court of Appeals held that the action was properly dismissed on the issue of negligence but held that the respondent was entitled to a new trial on the issue of unseaworthiness. In its first opinion the court said:

> "An owner, who has demised his ship, is not indeed liable to anyone but the demisee under his warranty of seaworthiness for any loss or injury suffered during the demise. Such liabilities sound in contract and he has not made any contract with anyone else. On the other hand, if the demisee has become liable to a third person because of an unseaworthiness existing at the time of the demise, the demisee may recover from the owner on the owner's warranty, whether the demisee is liable under his own warranty of seaworthiness, or under an imposed liability such as that to a longshoreman. Thus the ultimate liability rests upon the owner for any loss or injury occasioned by the ship's unseaworthiness at the time of delivery. If the demisee becomes insolvent or for any other reason is judgment proof,

> the longshoreman could probably join in one action the demisee and the owner; and at any rate he could accomplish the same result by two separate actions. Thus in final result to impose upon the owner-demisor a direct personal liability to a longshoreman for injuries resulting from an unseaworthiness antedating delivery, is to impose no greater loss than could be made to fall upon him as the law is. It would merely avoid a circuity of action."

In a Petition for a Re-hearing, it was pointed out that the charter party was not before the court, and that the court had assumed that the charter party between the United States and the Petitioner contained a warranty of seaworthiness. The petitioner further pointed out that the requisition Charter Party was published in the Federal register (for April 8, 1944) Vol. 9, part 4, page 3802, and that the Charter Party provided:

> "• • • the delivery of the Vessel by the Owner and the taking of the Vessel by the Charterer shall constitute a full performance by the Owner of all of the Owner's obligations under this Clause 1, and thereafter the Charterer shall not be entitled to make or assert any claim against the Owner on account of any agreements, representations or warranties, expressed or implied, with respect to the condition of the vessel."

The court denied a petition for a re-hearing, but modified its opinion as a result of the petition. It said:

> "It is true that in deciding that the owner of a demised ship was directly liable to a longshoreman for injuries caused by her unseaworthiness at the time of the demise, we used, as part of our reasoning, the fact that the loss would eventually fall upon the owner by a circuity of action. The longshoreman could recover of the demisee under *Seas Ship-*

ping Co. v. *Sieracki,* 328 U. S. 625, and the demisee could recover of the owner under the warranty. That is the ordinary situation and we adduced it to support our conclusion that the owner's direct liability involved very little practical change in the end result. Cumulatively, we invoked the privilege of the longshoreman to proceed against the ship in rem. We did not mean, however, that the direct liability was confined to cases in which the longshoreman could in fact avail himself of both or of either of these procedures. It would be particularly inappropriate in a given case to take as a test, whether the owner had excused himself from the warranty of seaworthiness ordinarily implied. By hypothesis the longshoreman is not a party to that contract, or to any contract, with the owner; and the question is of a liability imposed in invitum because of the ships' unseaworthiness. (*Seas Shipping Co.* v. *Sieracki,* 328 U. S. 625). It would therefore be irrelevant if the defendant at bar were to prove that the demise had excused it from implied warranty."

Specifications of Errors to be Urged.

The United States Court of Appeals for the Second Circuit erred:

(1) in holding that the petitioner was liable to the respondent for injuries caused by the unseaworthiness of the *Nemeha* when it was out of possession of that vessel.

(2) In holding that the petitioner as owner of the *Nemeha* when out of possession was liable to the respondent, a longshoreman, for injuries caused by the unseaworthiness of the vessel, even though it had been delivered to the United States under a demise charter which negatived any warranty of seaworthiness.

Reasons for Granting the Writ.

The decision of the Court of Appeals is clearly erroneous and it is in conflict with the decision of the Court of Appeals of the State of New York in *Muscelli* v. *Frederick Starr Contracting Co.*, 296 N. Y. 330 and with the decision of the Court of Appeals for the First Circuit in *Vitozi* v. *Balboa Shipping Co.*, 163 Fed. (2d) 286.

This case presents an important question of admiralty and maritime law which will affect all demise chartering operations, both private and public.

The Court of Appeals has held that an owner who charters a vessel without warranty as to her condition and with the express provision that there are no warranties as to seaworthiness is nevertheless liable for injuries to longshoremen which occur when the vessel is in possession of the demise charterer for any injuries that may have occurred due to any unseaworthiness existing at the time of the delivery of the vessel to the demise charterer. This rule, if upheld, will place an additional burden on the owner and will prevent many chartering operations. An owner of a laid up vessel will not be able to enter into a demise charter of that vessel to a person who is willing to put the vessel in condition for service because of the obligations and liabilities imposed by the decision in the case at bar. This decision means that an owner under those circumstances will be liable for any injuries caused by the unseaworthiness of the vessel at the time of delivery under the charter party regardless of what contract he makes with the charterer.

The decision of the Court of Appeals admits they are placing a new burden on a shipowner never heretofore imposed by any court. The court said (Rec. 184-A):

> "In the case at bar the defendant was not in possession of the ship, as owner, when the plaintiff was injured; neither was it an 'owner pro hac vice' by virtue of its possession under the operating contract. (*Caldarola* v. *Eckert,* 332 U. S. 155). Was there nevertheless a direct personal liability running from it to the plaintiff? Is that a proper corollary of *Seas Shipping Co.* v. *Sieracki, supra;* and, if so, what are the limits of such a liability. In the only two cases where the question has come up, it must be owned that the answer has been 'no'. (*Muscelli* v. *Frederick Starr Contracting Co.,* 296 N. Y. 330. *Vitozi* v. *Balboa Shipping Co.,* 163 Fed. (2d) 286 (C. A. 1)."

Judge Chase in his dissenting opinion said of the majority (Rec. 189-A):

> "Their path seems to rest on these assumptions: (1) the owner is liable over to the charterer because of an implied warranty of seaworthiness; (2) the longshoreman has a maritime lien on the ship in any case as a result of unseaworthiness; and (3) the owner's position is no worse and perhaps better, if he is directly liable because he may be able to limit his liability. "However desirable it may be to simplify litigation, this decision seems to extend the owner's warranty of seaworthiness under a bare boat charter not only directly to longshoreman and, of course, to seamen, but to make it a warranty to them of initial seaworthiness during the period when the owner has no control over the vessel even though the charterer might have eliminated or miti-

gated the effect of an apparent defect existing at the time of delivery. * * * Apparently, this is hereafter to be so in this circuit even though any implied contractual warranty of seaworthiness has been negatived in express terms in the charter."

In the Supplemental Opinion denying a re-hearing the court held that the longshoreman could sue the shipowner for breach of a warranty of seaworthiness existing at the time of the delivery of the vessel to the demise charterer regardless of the provisions of that charter party. The court said (Rec. 205-A):

> It is true that in deciding that the owner of a demised ship was directly liable to a longshoreman for injuries caused by her unseaworthiness at the time of the demise, we used, as part of our reasoning, the fact that the loss would eventually fall upon the owner by a circuity of action. The longshoreman could recover of the demisee under *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 625, and the demisee could recover of the owner under the warranty. That is the ordinary situation and we adduced it to support our conclusion that the owner's direct liability involved very little practical change in the end result. Cumulatively, we invoked the privilege of the longshoreman to proceed against the ship in rem. We did not mean, however, that the direct liability was confined to cases in which the longshoreman could in fact avail himself of both or of either of these procedures. It would be particularly inappropriate in a given case to take as a test, whether the owner had excused himself from the warranty of seaworthiness ordinarily implied. By hypothesis the longshoreman is not a party to that contract, or to any contract, with the owner; and the question is of a liability imposed in invitum because of the ship's unseaworthiness. (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 625).

It would therefore be irrelevant if the defendant at bar were to prove that the demise had excused it from implied warranty."

The decision of the Court of Appeals in the case at bar is in direct conflict with that of the Court of Appeals for the State of New York in *Muscelli* v. *Frederick Starr Construction Company*, 296 N. Y. 330, and that of the Court of Appeals for the First Circuit in *Vitozi* v. *Balboa Shipping Co.* 163 Fed. (2) 286.

In *Muscelli* v. *Frederick Starr Construction Company*, *supra* the plaintiff, an employee of a sand and gravel company, had gone to work on a vessel which his employer had chartered from the defendant about five months before the accident. He was injured when a "wearing" strip—a sort of outside planking around the craft—broke and collapsed. The wearing strip was in bad condition when the plaintiff's employer took possession under the charter. The Court of Appeals said, page 334:

> "The charter, which was in writing, recited that the hiring was on a 'daily bare boat' basis. It required the charterer (plaintiff's employer) to make at its expense 'all repairs and changes both to hull and machinery' and, at the end of the charter period, to return the craft to defendant in as good condition as when taken, ordinary wear and tear excepted. * * * It is entirely clear, if not conceded, that this was a demise charter, one where the entire control and possession of the vessel, and subsequent control over her navigation is 'surrendered to the charterer' who thus becomes her 'special owner' (*Leary* v. *United States*, 14 Wall. (U. S.) 607, 611). Such a charterer is clothed with 'the character or legal responsibility of ownership' (*Reed* v. *United States*, 11 Wall. (U. S.) 591, 601) and is the owner for the voyage without any sale or purchase

> of the ship. * * * Such a pro hac vice ownership, we think, casts all responsibility onto the charterer, and makes it impossible to hold defendant, the actual owner, liable here."

and at 336:

> "A charterer under a demise charter, that is, a charterer who is in full command and custody of the ship, is the owner pro hac vice with all the rights and obligations of an owner."

The Court of Appeals for the First Circuit in *Vitozi* v. *Balboa Shipping Co. Inc.*, 163 Fed. (2d) 286 had the same question before it. The plaintiff was a longshoreman injured by a defective winch. A motion was made for summary judgment on the ground that the defendant was not in possession and control of the vessel on the date when the plaintiff alleged that he was injured and the ship was at that time under a demise charter to the plaintiff's employer, United Fruit Company.

The court duly granted the defendant's motion and entered judgment accordingly. This judgment was affirmed upon appeal, the court saying:

> "In a charter of this kind in which the owner surrenders entire control and possession of the vessel and consequent control over its navigation to the charterer, the latter becomes what is called the owner pro hac vice. That is to say 'without any sale or purchase of the ship' the charterer becomes its owner for the term of the charter 'with the character or legal responsibility of ownership.' Reed *v.* United States, 11 Wall. 591, 600, 601, 78 U. S. 591, 600, 601, 20 L. ed. 220. Differently expressed the charterer under a demise charter party becomes the 'owner of the vessel chartered for the voyage or service stipulated, and consequently becomes sub-

ject to the duties and responsibilities of ownership'. Leary *v.* United States, 14 Wall. 607, 610, 81 U. S. 607, 610, 20 L. Ed. 756. See also United States *v.* Shea, 152 U. S. 178, 14 S. Ct. 519, 38 L. Ed. 403.

Certainly if under federal law a demise charter party casts the duties and responsibilities of ownership upon the charterer, under federal law it must cast upon him the duty and responsibility to see to it that the vessel is seaworthy during the term of the charter, even though it may not have been seaworthy at the time when the charter party was entered into. On this reasoning two courts in cases in point have held the shipowner not liable. In re New York Dock Co., 2 Cir., 61 F. 2d 777; Muscelli *v.* Frederick Starr Contracting Co., 296 N. Y. 330, 73 N. E. 536. We consider these cases correctly decided.

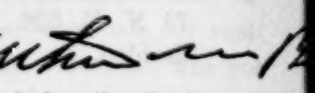
It has always been the rule that a demise charterer for the charter period had all of the incidents of ownership of the vessel including the right to limit liability. The Court of Appeals suggests that in the case at bar the owner out of possession could limit his liability, but there is nothing in the limitation statute which justifies that conclusion. That statute provides that a demise charterer shall be deemed the owner, but nowhere states, either directly or by implication, that both the owner and the owner *pro hac vice* shall have the right to limit. It has always been assumed that the two terms "owner" and "owner *pro hac vice*" were mutually exclusive. The provisions of the statute, U. S. C. Anno. Title 46, Section 186 are as follows:

> "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of

the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

It is submitted that the decision of the Court of Appeals is erroneous, that it is in conflict with the decision of the New York Court of Appeals, with the decision of the Court of Appeals for the First Circuit, that it makes a drastic change in the admiralty and maritime law and will disturb the practice of demise charterers which has been going on for a long time and which the shipping industry has understood and relied upon.

Respectfully submitted,



Counsel for the Petitioner.

August, 1949.

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NATHAN BAKER
Counsel for Respondent

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Statement of the Case

This action arises out of accidental injuries sustained by the respondent, a longshoreman on February 19, 1945 while performing work on board the "SS NEMAHA" which was docked at a Pier in Bayonne, N. J. At about 8:00 p.m. in the evening at the close of his work as a longshoreman, the respondent was ascending a Jacob's ladder leading from the side of the vessel to the deck of a lighter upon which he had been working and when he came near the top of the ladder a wooden rung broke causing him to sustain severe injuries. The Jacob's ladder was part of the ship's gear and belonged to the vessel. The vessel was owned by the petitioner, Lykes Bros. Steamship Co. Inc., and was bareboat chartered to the United States of America. The

respondent brought suit against the owners, Lykes Bros. Steamship Co. Inc., alleging two causes of action, one based upon unseaworthiness and the second based upon common law negligence. The first cause of action was dismissed at the end of the respondent's case and the second cause of action was submitted to the jury, which returned a verdict in favor of the respondent in the sum of $12,000.

This verdict was set aside by the trial Judge and the action was dismissed.

An appeal was taken to the Circuit Court of Appeals which reversed the judgment and remanded the cause for further proceedings.

The Circuit Court of Appeals in reversing the judgment held that the respondent was entitled to a new trial on the issue of unseaworthiness at the time that the vessel was delivered by the owner to the charterer (opinion p. 182). Thereupon, the petitioner filed a petition for rehearing, wherein it set forth the provisions of the charter party, the first paragraph of Clause 1 reading as follows (p. 192):

> "Unless otherwise stated in Part I, the vessel on her delivery shall be in Class A-1 American Bureau of Shipping or equivalent, tight, staunch and strong and in every respect *seaworthy,* serviceable and fitted for normal commercial service for a Vessel of her size, type and description."

The court denied the petition for rehearing on the material grounds involved in this matter, but modified its opinion (p. 202).

Subsequently, no further action was taken by the respondent towards applying for a retrial of this case in the District Court before a Jury. Instead the respondent, apparently taking the suggestion made by the Circuit Court of Appeals in its opinion, proceeded with the trial of the admiral-

ty action which this respondent had pending against the United States of America on the admiralty side of the court. The trial of this case against the United States of America as the bareboat charterer was tried in admiralty before Judge Goddard without a jury on June 27th and 28th, 1949 and resulted in a finding by the Court that the respondent, United States of America, was responsible for unseaworthiness of the vessel resulting in the injuries sustained by this respondent and awarded a decree in the sum of $12,000. A copy of the Court's opinion and the decree is annexed hereto.

The said admiralty case involved the same accident as involved this matter. The same plaintiff was involved and the same attorneys represented both of the parties. From said decree in the admiralty case an appeal was taken to the Circuit Court of Appeals for the Second Circuit on August 15, 1949, which appeal is still pending.

ARGUMENT

Summary of the Argument

POINT A. **The decision of the Circuit Court of Appeals follows decisions of the Supreme Court holding the shipowner liable for unseaworthiness at the time of the demise charter, resulting in an injury to a longshoreman, which liability is based on maritime law and not upon any warranty, express or implied.**

POINT B. **The legal question presented by the petitioner is moot as the petitioner has defended and is now appealing a proceeding in admiralty against the bareboat charterer The United States of America by the respondent herein, wherein the admiralty judge has found the charterer chargeable with unseaworthiness and awarded a judgment to the respondent herein.**

POINT A

The decision of the Circuit Court of Appeals follows decisions of the Supreme Court holding the shipowner liable for unseaworthiness at the time of the demise charter resulting in an injury to a longshoreman, which liability is based on maritime law and not upon any warranty, express or implied.

This case presents no new question of maritime law affecting demise chartering operations. The decision of the Circuit Court of Appeals follows decisions of the U. S. Supreme Court holding the owner of the vessel liable for unseaworthiness at the time of the demise, to the bareboat charterer and to the bailee of cargo and merely extends the liability to an injured longshoreman.

The U. S. Supreme Court decided the legal question involved in the case of *Cullen Fuel Co.* v. *W. E. Hedger*, 290 U. S. 82, 54 S. Ct. 10, where the trial court found that the vessel was unseaworthy at the time of the demise and found that the bailee of the cargo was entitled to recover from the owner, and refused limitation to the owner on the ground that the charter was the personal contact of the owner and included an implied warranty of seaworthiness. The court in its opinion stated:

> "The warranty of seaworthiness is implied from the circumstances of the parties and the subject matter of the contract and may be negatived only by express covenant. It is as much a part of the contract as any express stipulation. Delaware & Hudson Canal Co. v. Penna. Coal Co., 8 Wall. 276, 288, 19 L. Ed. 349; Grossman v. Schenker, 206 N. Y. 466, 469, 100 N. E. 39; United States v. A. Bentley & Sons Co. (D. C.), 293 F. 229.

> The petitioner urges that the denial of limitation in cases like this will sweep away much of the protection afforded to ship owners by the acts of Congress. But this view disregards the nature of the warranty. The fitness of the ship at the moment of breaking ground is the matter warranted, and not her suitability under conditions thereafter arising which are beyond the owner's control."

If liability of an owner of a vessel for unseaworthiness exists in favor of the bareboat charterer and in favor of a bailee of cargo, it must logically follow that this same liability should extend to a seaman in the employ of the charterer and to longshoremen performing ship's service under intermediary employers.

The Circuit Court of Appeals following the doctrine of the decision of the U. S. Supreme Court in the *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85 which decided that a shipowner was liable to a longshoreman who had been injured by the unseaworthiness of the ship, found that a proper corollary of that decision was to impose on the owner out of possession a direct personal liability for unseaworthiness at the time of the demise.

As was stated by the U. S. Supreme Court in the *Sieracki* case:

> "It is a form of absolute duty owing to all within the range of its humanitarian policy."

The personal rights of seamen and longshoremen are more within the range of that humanitarian policy than the property rights of the charterer and the cargo bailee in the *Cullen Fuel* case, *supra*.

The extension of the legal principles established in the *Cullen Fuel* case so as to include longshoremen in its bene-

fits, so that now as to longshoremen as well as to charterers and cargo bailees, the shipowner is absolutely liable for unseaworthiness of the vessel at the time of the demise charter, does not make any change or departure from the existing maritime law.

The decision of the Circuit Court of Appeals in refusing to consider the demise charter on the application for rehearing (p. 203) was proper and did not place any additional burden on the owner. It merely followed the decision of the U. S. Supreme Court in the *Seas Shipping Co.* v. *Sieracki* case, 328 U. S. 625 and stated:

> "In that case the Supreme Court decided that, quite independently of any warranty of seaworthiness, a shipowner was liable to a longshoreman who had been injured by the unseaworthiness of the ship. This the court held, was not a consensual, but an imposed, liability; and indeed the opinion suggested that it had been a mistake ever to suppose that in origin the liability for unseaworthiness demanded any warranty, express or implied."

This imposed liability for unseaworthiness is based on maritime law, and not upon warranty, express or implied. Therefore, consideration of the charter party agreement is immaterial and has no bearing on the legal question involved. The Circuit Court of Appeals correctly stated (p. 203):

> "By hypothesis the longshoreman is not a party to that contract, or to any contract, with the owner; and the question is of a liability imposed in invitum because of the ship's unseaworthiness."

citing *Seas Shipping* v. *Sieracki, supra.*

It is submitted that the decision of the Circuit Court of Appeals is correct and follows the law established by the U. S. Supreme Court in the *Cullen Fuel* and *Sieracki* cases above cited and is a proper corollary of these decisions.

POINT B

The legal question presented by the petitioner is moot as the petitioner has defended and is now appealing a proceeding in admiralty against the bareboat charterer, The United States of America by the respondent herein, wherein the admiralty judge has found the charterer chargeable with unseaworthiness and awarded a judgment to the respondent herein.

The legal questions raised by the petitioner is now moot. To proceed to a legal determination of the questions presented by the petitioner on this petition would avail it nothing.

The petitioner apparently attempts to avoid responsibility on its part as the owner of the vessel, contending that the responsibility for unseaworthiness is on the United States of America as the bareboat charterer. The respondent in this matter instead of proceeding with the retrial of the civil case involved herein, apparently took the suggestion of the Circuit Court of Appeals and proceeded with the admiralty action then pending against the United States of America. The Circuit Court of Appeals in its decision stated (p. 187):

> "We hold that the defendant was so liable, and upon a new trial the plaintiff may have his damages assessed by a jury, if he can satisfy them that the unseaworthy rung was on the ship, and in the same

> condition, when the defendant delivered her to the United States. However, it may be that he will not be able to make that proof; and if he cannot, another course is open to him. • • • he will avoid the necessity of proving that the rung was on board, and unseaworthy, when the defendant delivered the ship to the United States."

In the admiralty action the respondent was the libellant in its action against the United States of America as the bareboat charterer and after trial before an admiralty Judge without a jury, the court found that the vessel was unseaworthy and responsible for the injuries to the plaintiff and entered judgment in the sum of $12,000. A copy of the opinion of the Admiralty Court and a copy of the judgment are annexed hereto. The United States of America in the admiralty case was represented by the same attorneys as the petitioners in this case, and have filed an appeal to the Circuit Court of Appeals on August 15, 1949, which appeal is still pending.

It therefore appears that it would serve no beneficial purpose to consider the legal question presented whether the respondent can hold the petitioner, as shipowner, liable for unseaworthiness at the time of delivery of the vessel to the charterer when the record shows that in subsequent proceedings in admiralty, respondent has recovered a judgment against the bareboat charterer on the finding of unseaworthiness.

The question is moot and the writ of certiorari should be denied.

In the case of *Chicago Great Western Railroad Co.* v. *Beecher*, 150 F. 2nd, 2nd series, 394, cert. denied 63 S. Ct. 1158, the court held:

"Another well established rule is that courts will decide only actual controversies, and that an appellate court, when an event has occurred which renders it impossible to grant any effectual relief to the appellant, will not proceed to judgment but will dismiss the appeal."

In the case of *Otis* v. *Inter Mercantile Marine Co.*, 95 F. 2nd 539, C. C. A. 9th Circuit, the court stated:

"This appeal presents a single question namely did the District Court have jurisdiction of the case? This question is now moot. For us to answer it in the affirmative, reverse the decree of dismissal and remand the case for further proceedings would avail libelants nothing. The subject matter of the litigation no longer exists. Possession thereof cannot be obtained by court decree or otherwise. * * * Presenting only a moot question, the appeal will be dismissed. Mills v. Green, 159 U. S. 651; Jane v. Montague, 194 U. S. 147; Richardson v. McClenney, 218 U. S. 487; Stearns v. Wood, 236 U. S. 75."

In the case of *The Silver Palm*, 94 Fed. 2nd 781, the court stated:

"The petition for limitation of liability was finally denied by the District Court and its denial affirmed by this court, this court dissolving the injunction against separate proceedings and holding that all the claimants could pursue their claims in the limitation proceeding or on separate litigation, as they may be advised. Consequently, the claimants may so proceed, and the issue on this appeal respecting the modification of the injunction has become moot. The appeal is therefore dismissed."

CONCLUSION

It is therefore, respectfully submitted that there was no substantial error in the proceedings below and no sufficient grounds for a further review have been shown and that this case is not a proper one for review by certiorari in this court. The petition for writ of certiorari should be denied.

Respectfully submitted,

NATHAN BAKER
Counsel for Respondent

EXHIBIT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A 144-9

FRANK CANNELLA,

Libelant,

—against—

UNITED STATES OF AMERICA
and WAR SHIPPING ADMINISTRATION,

Respondents.

MEMORANDUM

GODDARD, *District Judge* (Orally):

The libelant, Frank Cannella, a stevedore in the employ of M. P. Smith & Sons Co. Inc., was engaged in discharging cargo from a lighter aboard the steamship Nemaha which was moored to a pier at Bayonne, New Jersey.

At 7:45 in the evening of February 19th, 1945, after Cannella and others on the lighter finished work and he was climbing up a jacob's ladder to cross the ship's deck on his way ashore, he fell to the deck of the lighter and was injured. It was a rope ladder with rungs of wood and was furnished by the ship.

The case presents an issue of fact. The libelant and his witness testified that one of the rungs broke. The

respondent's witnesses deny that it broke and assert that it was in good condition.

I did not see all the witnesses as some of the testimony was in the form of deposition or testimony given in another trial. I did see and hear Cannella and DiSimone, the hatch foreman, and each of them impressed me as honest and reliable. Cannella said the rung gave way and DiSimone testified that he examined the ladder after Cannella fell, and that one rung was "split and broke right in two". Clark, Second Officer on the Nemaha, in a deposition testified that he saw the ladder after the accident and that one of the rungs was broken.

The respondents' evidence as to the condition of the ladder consisted of the testimony of the Chief Officer, night mate and boatswain of the Nemaha in another trial; also the testimony of Cappola, a longshoreman. Each said they had looked at the ladder after the accident and that it was in good condition. There was nothing in the log of the Nemaha indicating that the ladder had been examined by any of them after the accident and that it was in good condition and no report, written or otherwise, was made by either of them as to the ladder and its condition, and their testimony was based upon their memory over three years later and was so elaborate that it lacked conviction, and Cappola did not impress me favorable. I give no credance to the statement alleged to have been made to respondents' claims agent by Cannella soon after he had been taken to the hospital suffering from severe shock and under the influence of drugs to relieve his pain.

My conclusion is that the ladder was defective and broke; that the Nemaha was unseaworthy in this respect and that this was the cause of Cannella's fall.

Cannella sustained a fracture of the right femur and a metal pin was inserted to keep the parts in place. He was

in the Bayonne Hospital for about two months and was confined to his home for seven months. He has a shortening of the right leg of 5/8 to 3/4 of an inch; walks with a slight limp, and has a loss of flexation in right hip compared with left hip of 10-15 degrees.

On January 2, 1946 he started working, doing light work for some weeks and for some months lost an average of one day a week because of the condition of his leg.

His doctors and hospital bills amounted to $740. In 1944—the year before he was injured, he earned $4,071.08.

In my judgment fair compensation for the expenses he has incurred, loss of earnings, pain and suffering, is $12,000.00.

The libel contains two counts. 1—Alleging unseaworthiness; 2—negligence.

Libelant may have a decree on the First Count for $12,000.00 and dismissing the Second Count.

June 28, 1949.

HENRY W. GODDARD
U. S. D. J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 288

LYKES BROS. STEAMSHIP CO. INC.,
Petitioner,

vs.

FRANK CANNELLA,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER.

ARTHUR M. BOAL,
Counsel for the Petitioner.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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The Respondent in his answer does not question the fact that there is a conflict between the decision of the Court of Appeals for the Second Circuit in this case and the decision of the Court of Appeals of the State of New York in *Muscelli* v. *Frederick Starr Contracting Co.*, 296 N. Y. 330 and that of the Court of Appeals for the First Circuit in *Vitozi* v. *Balboa Shipping Co.*, 163 Fed. (2d) 286.

The Respondent's main contention is that the issues are moot. It is true that the Respondent had an action in admiralty pending against the United States as owner *pro hac vice* of the *SS Nemaha*. That case was tried and resulted in a decree in favor of the Respondent against the United States. The United States has taken an appeal to

the Court of Appeals for the Second Circuit from the decree against it. The appeal has not yet been heard.

That decree in admiralty in the case of Respondent against the United States does not render the issues in this case moot. The Court of Appeals sent this case back to the District Court for a new trial on the issue of whether the vessel was seaworthy at the time she was delivered by the Petitioner to the United States. This action has not been discontinued or dismissed.

If the Respondent loses his case against the United States, he will then go back and try this case against the Petitioner.

It is respectfully submitted that the petition should be granted and this court resolve the conflict between the decisions of the Court of Appeals in this case and those of the New York Court of Appeals and the Court of Appeals for the First Circuit.

Respectfully submitted,

ARTHUR M. BOAL,
Counsel for the Petitioner.